IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MAURICE LEWIS,

Defendant and Appellant.

B204093

Los Angeles County Superior Court No. BA316997
The Honorable Norman J. Shapiro, Judge

RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

LINDA C. JOHNSON
Supervising Deputy Attorney General

KAREN BISSONNETTE
Deputy Attorney General
State Bar No. 129981

300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 620-6426
Fax: (213) 897-6496

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Statutes

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **MAURICE LEWIS,** Defendant and Appellant.	B204093

STATEMENT OF THE CASE

In an amended information filed by the District Attorney of Los Angeles County, appellant was charged with the following offenses: count I, assault with a firearm (Pen. Code, § 245, subd. (a)(2))[1/]; count II, making criminal threats (§ 422); count III, brandishing a firearm at an occupant of a motor vehicle (§ 417.3); count IV, possession of a firearm by a felon (§ 12021, subd. (a)(1)); count VI,[2/] unlawful firearm activity (§ 12021, subd. (c)(1)); count VIII, possession of ammunition while being a felon (§ 12316, subd. (b)(1)); count IX, failing to initially register as a sex offender (§ 290, subd. (a)(1)(A)); and count X, with failing to file a change of address while being a sex offender (§ 290, subd. (f)(1)(B)). The amended information

---

1. Unless otherwise noted, all further statutory references will be to the Penal Code.

2. The amended information did not include either a count V or a count VII. (See also 1CT 60-61 [original information, which did include these counts].) Pursuant to stipulation, the counts contained in the amended information were renumbered so that former count VI became count V, and former count VIII became count VI. (1CT 172.) Counts IX and X were severed from the other charges (1CT 98), and ultimately were dismissed on the prosecution's motion (1CT 206).

included special allegations of personal use of a firearm (§ 12022.5; counts I-III), and a prior serious or violent felony conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d); all counts). (1CT 100-106.)

Appellant pleaded not guilty and denied the special allegations. (1CT 107-108.) Trial was by jury. (1CT 99.) The jury found appellant guilty as to counts I through VI, and found the firearm use special allegation true as to counts I and II. (1CT 164-169, 172.) Appellant admitted the prior conviction allegations. (1CT 191.) The trial court sentenced appellant to a total term of 19 years and 8 months in state prison. (1CT 199-206.)

This appeal is from the judgment. (1CT 208.)

STATEMENT OF FACTS

A. Prosecution Evidence

On January 20, 2007, Lloyd Collins, an automobile repossessor employed by Pirate Recovery, received an order from Lobel Financial to repossess a Monte Carlo automobile. He determined that he and another Pirate Recovery employee, Angela Daywalt, had repossessed the same vehicle two years earlier, and that appellant had done whatever was necessary at that time to regain lawful possession of the car. (2RT 261-274, 354-356.)

In the early morning hours of January 22, 2007, Collins and Daywalt went to appellant's home at 5514 South Budlong Avenue in Los Angeles to repossess the Monte Carlo. It was parked in basically the same spot it had been in two years earlier. Collins got out of his truck to hook up the Monte Carlo so it could be towed away. The car alarm went off the moment he touched the car. Nonetheless, he connected the tow cables to the car. Using his walkie-talkie, Collins told Daywalt to drive forward and turn right, as he was concerned for her safety. He went to talk to appellant, who was standing on the porch with a woman, later identified as Forever Merritt. Appellant was pointing a shotgun

at him. Collins was not really surprised, however, as it was not uncommon in his line of business to have people pull guns. Appellant yelled that Collins "wasn't going to take his fucking car again," and Collins "might as well drop that shit" before appellant shot him. Collins told him to put the gun down, and said that the repossession was the same type of repossession that he had done two years earlier. Appellant kept saying "fuck you" and threatened to "cap" Collins. Collins became afraid when appellant did not move from his position on the porch, which was only about seven to ten feet from where Collins was standing, as he realized that appellant was serious about what he was doing. (2RT 275-283, 296, 357-365.)

Collins thought that appellant was going to shoot him, and began to fear for his life. He backed away with his hands up. Appellant pointed the shotgun at Daywalt. Collins told Daywalt to turn on the next block, and that he would catch up with her there. He met her shortly thereafter. (2RT 289-290.) A Nissan Altima drove by very quickly, and Collins told Daywalt to speed up. The Nissan was being driven by the woman he had seen earlier on the porch. She was alone. She tried to block Collins and Daywalt from leaving the area. The Nissan drove away, but soon returned. This time, appellant was driving. Collins positioned himself in order to attempt to get into his truck. Appellant blocked his way, then got out of the Nissan. Daywalt drove forward. Appellant ran toward Collins and pulled out a handgun. He pointed it at Collins. Collins began to run away but struck his head on a palm tree, leaving him with a small scar on his forehead. Collins ran down the sidewalk with appellant chasing him. At some point, appellant stopped. Collins finally managed to get into his truck. Collins did not see where appellant went initially, but saw him again driving the Nissan. (2RT 296-306, 365-374.)

Appellant chased Collins and Daywalt. They were driving on the wrong side of the street. Daywalt was afraid because appellant was armed, and

drove in a zig-zag pattern. During the pursuit, appellant almost ran into a bus and at one point went over a curb. Collins and Daywalt called the police and gave them directions to their location. Appellant tried to get in front of Collins' truck. Daywalt, who was driving, with appellant's Monte Carlo still hooked up to the truck, tried to keep appellant behind them. A police unit approached their location. Both Daywalt and appellant stopped. Appellant turned right when he saw the police coming; that was the last time Collins saw him. (2RT 306-309, 375-387.) Collins met with the officers who responded to the scene and told them what had happened. Two officers stayed with Collins and Daywalt, while other units began searching for the Nissan. (2RT 329-330, 382-388.)

Officers took appellant into custody at about 6:30 a.m., outside the Budlong Avenue home. They searched the house for firearms, with Merritt's consent, as they had been advised that a gun had been used in the incident. They were unable to locate any weapons, but did not open containers or look underneath clothing during the search of the residence. The home was cluttered and there were a lot of boxes and articles of clothing scattered throughout the home. One of the officers felt that he was unable to perform a thorough search given the amount of clutter in the home and because the consent to the search could have been withdrawn at any time. (2RT 404-413, 417.) The officers saw a blue Nissan at the scene, but did not search it. (2RT 418-419.) Officers drove Collins to the Budlong address, where he identified appellant. (2RT 330-331.)

Detective Bradley Mossie was assigned to investigate the case. He spoke with Collins and Daywalt on the phone and met with them in person. Detective Mossie obtained a search warrant for the Budlong Avenue address, which was executed on February 9, 2007. During the search, officers found the shotgun appellant had pointed at Collins, a Remington 870, which Collins subsequently identified. They also found nineteen live shotgun shells on the upper shelf of the closet in the master bedroom. The shotgun and shells were

seized and booked into evidence. The police also found documents, including utility bills and a notice from Lobel Financial concerning the Monte Carlo, with appellant's name on them. They did not find any other firearms. (2RT 332, 423-450; 3RT 489-492.)

The parties stipulated at trial that appellant had been convicted of rape in concert in 1994, and that, as relevant to counts IV and VIII, he had suffered that conviction. As to count V, it was stipulated that appellant had been convicted of misdemeanor spousal battery in 2004. (3RT 503-504.)

B. Defense Evidence

Appellant did not testify on his own behalf, but he did call Forever Merritt as a defense witness. Merritt had lived at 5514 South Budlong Avenue since 2002. A closet in the master bedroom had a shotgun, in a case, along with shotgun shells, which were kept in a box on the top shelf of the closet. The box was wrapped up in a black plastic bag. Merritt only got the shotgun a few days before the incident involving Collins. Appellant's sister, Monique Lewis, whom Merritt referred to as her "sister-in-law," brought it over to Merritt's house on February 4, 2007, just a few days before the search warrant was served. It was not loaded when Merritt got it, and to her knowledge was never loaded. (3RT 508-513, 524-526.) Lewis asked Merritt if she could store the shotgun until she found someplace else to store it, as Lewis' sons were old enough to find things in her closet. (3RT 525.) Lewis also brought the shotgun shells. (3RT 523.)

Appellant was the father of Merritt's two children. He did not really live with her, but did receive mail there, including utility bills. However, when she made a domestic violence complaint against appellant in 2004, she told the police that appellant lived at the Budlong Avenue address. Merritt obtained a restraining order against appellant at that time. It was in effect for three years, at which time she went to court to have it removed. On the morning of the

incident involving Collins, appellant arrived at about 5:30 a.m. to babysit their children while Merritt was at work. (3RT 514-522, 537-538.)

Merritt and appellant were not married but had had an "on again, off again" relationship dating back to 2000. On the morning in question, Merritt saw someone "messing" with appellant's car, so she went outside and told him to get away from the car. The car alarm went off. The man said, "Shut up. Go back in the house. Mind your own business." Appellant came out when he heard the car alarm. Merritt owned a Chevrolet Malibu; neither she nor appellant had ever had a Nissan Altima. (3RT 530-536.)[3/]

---

3. This portion of Merritt's testimony was not elicited on cross-examination, but rather when the prosecution was deemed to have taken her as a prosecution witness. (3RT 530.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISCHARGE HIS RETAINED ATTORNEY

Appellant's first contention is that he should have been permitted to relieve retained counsel. (AOB 14-23.) Respondent disagrees.

A. The Relevant Proceedings Below

Appellant was represented by private counsel (Mac Neoray) at the preliminary hearing. (1CT 1.) At the arraignment, which was held on May 16, 2007, counsel was relieved, and the Los Angeles County Public Defender's Office was appointed to represent appellant. (1CT 79-80.) At a pretrial conference held on June 14, 2007, the Public Defender's Office was relieved, as appellant had once again retained private counsel (Alan Ross). (1CT 81.)

On July 18, 2007, defense counsel stated that he was ready for trial and the case was sent to Department 100 for jury trial. (1CT 87.) After being trailed for several days, the case was transferred to Department 116 for jury trial on July 20, 2007. (1CT 91.) A possible disposition was discussed, as well as issues regarding witnesses and scheduling matters. (1CT 92.) On the next court day, July 23, 2007, a possible disposition was again discussed, which appellant declined. Defense counsel moved to bifurcate the prior conviction allegations; the trial court granted the motion. Voir dire then commenced. (1CT 94-95; 1RT 1-86.)

When court convened the following morning, July 24, 2007, appellant stated that he wanted a "*Marsden*[4/] motion to relieve my counsel." The trial court replied that it was "a little late" in the proceedings to do so, as the parties

---

4. *People v. Marsden* (1970) 2 Cal.3d 118.

were in the midst of jury selection. Appellant stated, "I am not being represented." (1 CT 96; 1RT 87-88.) Following a brief recess so that appellant could change into civilian clothing, the bailiff indicated that appellant refused to return to the courtroom. The trial court had appellant brought into the courtroom in order to advise him of his right to be present during the trial proceedings if he wished. Appellant stated that he did not want to be present, and repeated that he wanted his counsel relieved. The trial court again explained that it was too late to change counsel at that point in the proceedings, as doing so would enable him to "hire lawyer after lawyer, and on the eve of trial or just the beginning of trial, fire your lawyer, and then we'd never get the case tried." (1RT 88-91.) Appellant said that he did not want his lawyer to represent him any longer, and wanted counsel "removed" because "he's been lying to me the whole time" and "hasn't done anything." The court excused the prosecutor, at defense counsel's request. (1RT 92-93.)

Defense counsel then recounted the chronology of events which took place after he was initially retained to represent appellant, specifically his efforts to obtain and review the case file. Counsel stated that he provided appellant with a copy of the preliminary hearing transcript once he received the file, and provided appellant with his analysis of the case. Counsel did not tell appellant that the case was impossible to defend, as there was some possible reasonable doubt, particularly concerning the first three counts. Counsel stated that he and appellant initially got along well, but as the proceedings continued, appellant began to make complaints about the lack of pretrial motions. Counsel noted that appellant's girlfriend insisted that a motion to dismiss based on alleged inconsistencies in the preliminary hearing testimony should have been made, but counsel indicated that such a motion would not have been well taken. The

trial court then denied the motion to relieve counsel,[5] finding that the record failed to demonstrate that counsel's continued representation of appellant would deprive him of his right to representation. (1RT 94-97.)

B. The Applicable Law

The right of a nonindigent[6] criminal defendant to discharge his retained attorney, with or without cause, has long been recognized in this state. (*People v. Ortiz*, *supra*, 51 Cal.3d at p. 983.) While a defendant may discharge appointed counsel only if that lawyer is rendering inadequate representation or there exists an irreconcilable conflict between counsel and client (see *People v. Marsden*, *supra*, 2 Cal.3d at p. 123), he or she may discharge retained counsel for any reason. (*People v. Ortiz*, *supra*, 51 Cal.3d at p. 984.)

"The right to discharge retained counsel is not, however, absolute." (*People v. Keshishian* (2008) 162 Cal.App.4th 425, 428.) The trial court may deny a request to discharge retained counsel "if discharge will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it

---

5. The court at one point referred to the motion to relieve counsel as a "*Marsden* motion" (1RT 97), possibly because that was how appellant himself had referred to his request. (See 1RT 88.) Under the circumstances, it appears that the trial court may have simply been referring to the motion as a "*Marsden* motion," using appellant's phraseology, simply in order to avoid confusing appellant.

6. The record is somewhat ambiguous regarding whether or not appellant was indigent. As noted above, he was represented for almost a month in this case by the Los Angeles County Public Defender's Office. Moreover, in a declaration attached as an exhibit to appellant's new trial motion, Forever Merritt indicated that she and appellant's grandfather retained Mr. Ross to represent appellant at trial. (See Exhibit 2 to Appellant's Motion to Augment filed on April 3, 2008; see also Supplemental Clerk's Transcript ["SCT"] 12 [declaration appears to be missing from augmented record].) In any event, this point is irrelevant, as a trial court must not consider whether the defendant is indigent and will require appointment of counsel in ruling on a timely motion to discharge retained counsel. (See *People v. Ortiz* (1990) 51 Cal.3d 975, 987.)

will result in 'disruption of the orderly processes of justice' [citations]." (*People v. Ortiz, supra*, 51 Cal.3d at p. 983, quoting *People v. Gzikowski* (1982) 32 Cal.3d 580, 587.) "[T]he 'fair opportunity' to secure counsel of choice provided by the Sixth Amendment 'is necessarily [limited by] the countervailing state interest against which the sixth amendment right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of "assembling the witnesses, lawyers, and jurors at the same place at the same time."'" (*People v. Ortiz, supra*, 51 Cal.3d at pp. 983-984, quoting *Sampley v. Attorney General of North Carolina* (4th Cir. 1986) 786 F.2d 610, 613.)

Because the right to discharge retained counsel is broader than the right to discharge appointed counsel, a *Marsden*-type hearing at which the court determines whether counsel is providing adequate representation or is tangled in irreconcilable differences with the defendant is "'[an] inappropriate vehicle in which to consider [the defendant's] complaints against his retained counsel.'" (*People v. Hernandez* (2006) 139 Cal.App.4th 101, 108, quoting *People v. Lara* (2001) 86 Cal.App.4th 139, 155.) Instead, under the applicable test for retained counsel, the court should "balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution." (*People v. Lara, supra*, 86 Cal.App.4th at p. 153.) In so doing, the court "must exercise its discretion reasonably: 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defense with counsel an empty formality.'" (*People v. Ortiz, supra*, 51 Cal.3d at p. 984, quoting *People v. Crovedi* (1966) 65 Cal.2d 199, 207.) At the same time, "'[t]he right to counsel cannot mean that a defendant may continually delay his day of judgment by discharging prior counsel,'" and the court is within its discretion to deny a last-minute motion for continuance to secure new counsel. (*People v. Rhines* (1982) 131 Cal.App.3d 498, 506, quoting *People v. Kaiser* (1980)

113 Cal.App.3d 754, 761.)

C. Permitting Counsel To Be Discharged Would Have Clearly Disrupted The Orderly Processes Of Justice, As Jury Selection Had Commenced At The Time The Request Was Made And Allowing New Counsel To Begin Representing Appellant Would Have Necessitated A Continuance Of Unknown Duration

Here, while the proceedings which transpired after appellant made his motion to discharge appointed counsel may have appeared in some respects to constitute a "*Marsden*-type" hearing,[7] given the totality of the circumstances, it is clear that the trial court applied the correct legal principles in denying the motion. Even had the court improperly relied on *Marsden*, however, appellant would not be entitled to an automatic reversal of his conviction, as the court's ruling on the motion effectively addressed the issues it should have considered in the course of an *Ortiz* motion regarding retained counsel. (See *People v. Lara*, *supra*, 86 Cal.App.4th at pp. 155-156 [there is no automatic right to reversal merely because a trial court improperly relies on *Marsden*, as appellate court must consider whether the trial court's ultimate ruling effectively addresses the issues it should have considered in the ruling on an *Ortiz* motion].)

At all times, it is clear that what was foremost in the trial court's mind was the obvious disruptive effect which granting the motion would have had on the "orderly processes of justice" as that phrase was used in *People v. Ortiz*, *supra*, 51 Cal.3d 975. Indeed, the first thing the trial court said after appellant said that he wished to make a "*Marsden* motion" was that it was "a little late"

---

7. For example, as noted above, at one point the trial court referred to appellant's motion as a "*Marsden* motion," although it may have done so simply because appellant had already referred to the motion that way and the court likely did not want to confuse appellant. In addition, as was the case in *People v. Hernandez*, *supra*, 139 Cal.App.4th at p. 105, fn. 3, the sealed reporter's transcript of the proceedings in question states it is a transcript of a "*Marsden*" hearing. (See 1RT 94.)

in the proceedings to do so, as the parties were in the midst of jury selection. The court shortly thereafter explained that it was too late to change counsel at that point in the proceedings, as doing so would enable him to "hire lawyer after lawyer, and on the eve of trial or just the beginning of trial, fire your lawyer, and then we'd never get the case tried." Allowing counsel to be discharged would almost certainly have necessitated a continuance of some length, as the record does not indicate that any attorney was present in the courtroom and able to immediately take over for Mr. Ross had the latter been discharged. Doing so would have been extremely inconvenient to the prosecutor, the witnesses, and the prospective jurors, some of whom had already undergone fairly lengthy voir dire by the time the motion was made.

While appellant states that he did not make his request in an attempt to improperly delay the proceedings (AOB 20) and that his request was "made in good faith" (AOB 21), it is difficult to credit this assertion given that appellant refrained from making his request until the second day of jury selection despite having had numerous opportunities to do so earlier. For example, he could have asked the trial court to discharge counsel on July 18, 2007, the date defense counsel stated that he was ready for trial and the case was sent to Department 100 for jury trial. Alternatively, he could have made his motion when the case was trailing, or when the matter was transferred to Department 116 for trial on July 20, 2007. Or he could have voiced his complaints about counsel on July 23, 2007, prior to the commencement of jury selection, when a possible disposition was again discussed. During those proceedings, appellant personally addressed the court on several occasions, yet never took those opportunities to request that counsel be discharged. (1RT 6, 11, 13.) It is obvious that the grounds supporting appellant's request (i.e., counsel had allegedly been dishonest with him and had failed to make certain pretrial motions) were known to appellant during each of these proceedings, yet

he chose to remain silent and make his request at the eleventh hour.

The facts of this case are similar to those in *People v. Lau* (1986) 177 Cal.App.3d 473. In *Lau*, the defendant and an accomplice were charged with attempted murder. The defendant was represented by privately retained counsel. Counsel failed to appear in court for the scheduled first day of trial, but appeared the next day. Following unsuccessful discussions concerning a plea agreement, the defendant moved to discharge his retained counsel and claimed a conflict of interest existed because counsel believed he was guilty. The trial court denied the motion because there were no legally sufficient reasons supporting the motion, particularly given the late date at which it was being made, i.e., "literally the moment jury selection was to begin." (*People v. Lau*, *supra*, 177 Cal.App.3d at pp. 477-479.) The court noted the basic problem was the defendant's disagreement with counsel's analysis and evaluation of the case against him, but found that such a difference of opinion did not justify substitution of attorneys, "'particularly in a two defendant case at this point in time.'" (*Id.* at p. 479.)

The Court of Appeal in *Lau* held that the trial court properly denied the motion and that, as evidenced by the trial court's comments, "the timeliness, or lack thereof, of the request properly concerned the court." (*Ibid.*) Of particular note, given the facts of the present case, the appellate court in *Lau* went on to note as follows:

> Faced with the fact that [the codefendant's attorney] had announced ready to proceed and with the untimeliness of [the defendant's] request, the court nonetheless considered [defendant's] remarks regarding his disagreement with counsel. Counsel admitted being angry with [the defendant], but assured the court he would defend [defendant] to the best of his abilities.

(*Ibid.*) The reviewing court in *Lau* concluded that the trial court had properly

considered and denied the defendant's request, "especially given its untimeliness." (*Ibid.*)

Similarly, in *People v. Turner* (1992) 7 Cal.App.4th 913, the defendant moved to discharge his attorney, who was employed by a neighborhood legal clinic. The trial court denied the motion and found that the defendant's only purpose in bringing the motion was to delay the proceedings. (*People v. Turner*, *supra*, 7 Cal.App.4th at pp. 915-916.) On appeal, the defendant argued that his attorney was not appointed counsel but more akin to retained counsel, and that the trial court had therefore erred in relying on *Marsden*. The defendant argued he had a presumptive right to replace his attorney under *Ortiz*. (*Id.* at p. 917.) The Court of Appeal found that the trial court would properly have denied the request even if counsel had been privately retained, given that the defendant's request occurred on the first day of trial, noting that the defendant failed to present "any coherent reason for doubting the competence, diligence, motivation, or commitment of his existing counsel." (*Id.* at p. 919.)

More recently, in *People v. Keshishian*, *supra*, 162 Cal.App.4th 425, Division Four of this Court found that the trial court properly denied the defendant's motion to discharge retained counsel, as well as a continuance to hire new attorneys. There, the motion was made on the day the matter was called for trial, on the basis that the defendant had "lost confidence" in his attorneys. (*People v. Keshishian*, *supra*, 162 Cal.App.4th at pp. 427-428.) The reviewing court upheld the denial of the motion, noting as follows:

> An indefinite continuance would have been necessary, as appellant had neither identified nor retained new counsel. Witnesses whose appearances had already been scheduled would have been further inconvenienced by an indefinite delay . . . . That appellant had inexplicably "lost confidence" in his experienced and fully prepared

counsel did not constitute good cause for granting the continuance requested, nor justify the disruption to the judicial process that would have ensued.

(*Id.* at p. 429.)

On the other hand, some reviewing courts have reversed convictions on the basis that a motion to discharge retained counsel was wrongfully denied. However, the procedural posture of these cases has been, in each instance, dissimilar in important ways to those in *Lau*, *Turner*, and *Keshishian*, as well as the present case.

For example, in *People v. Lara*, *supra*, 86 Cal.App.4th 139, upon which appellant relies heavily (see AOB 19-20, 23), the defendant's motion to discharge his retained counsel was made on the scheduled first day of trial, but before jury selection began. (*People v. Lara*, *supra*, 86 Cal.App.4th at pp. 146-148.) The trial court denied the motion. The appellate court reversed, noting that there was no evidence to suggest that the defendant raised his complaints about counsel in an effort to improperly delay the proceedings. The record in that case suggested that counsel had not consulted with defendant during the numerous continuances, and defendant was unaware of the nature of counsel's preparation "until the moment the trial was finally set to begin." (*Id.* at pp. 162-163.)

In the *Ortiz* case, the defendant's motion to discharge his retained counsel was found to be timely because it was made after a mistrial had been declared and well before the second trial started. (*People v. Ortiz*, *supra*, 51 Cal.3d at p. 987.)

In *People v. Hernandez*, *supra*, 139 Cal.App.4th 101, a request to discharge retained counsel was made and denied almost immediately before jury selection was to begin in a two-defendant case. The Court of Appeal reversed, as the trial court appeared to base its decision to deny the motion

entirely on application of a *Marsden* analysis, and did not adequately address the issue of delay. (*People v. Hernandez*, *supra*, 139 Cal.App.4th at p. 109.)

In *People v. Munoz* (2006) 138 Cal.App.4th 860, the appellate court reversed a conviction because the trial court erred in addressing the defendant's request to relieve his retained counsel utilizing the *Marsden* standard rather than the standard enunciated in *Ortiz*. There, however, the request was made after conviction but before sentencing, and the Court of Appeal held that there is nothing in *Ortiz* that suggests that its holding is limited to the pretrial context. (*People v. Munoz*, *supra*, 138 Cal.App.4th at p. 867.)

Lastly, in *People v. Stevens* (1984) 156 Cal.App.3d 1119, which was decided before *Ortiz*, the trial court was found to have improperly denied a motion to relieve privately retained counsel where the request was made two weeks before trial was scheduled to begin. (*People v. Stevens*, *supra*, 156 Cal.App.3d at p. 1128.)

Here, in sharp contrast to the cases discussed above, appellant's request was not made weeks before the trial was scheduled to begin, immediately before jury selection was to begin, after a mistrial had been declared and well before the second trial started, or after conviction but before sentencing. Rather, as noted above, it was made *after prospective jurors had been sworn and voir dire had commenced*. Needless to say, granting appellant's motion and continuing the trial for an indefinite period at that point of the proceedings would have severely disrupted the trial proceedings and inconvenienced numerous witnesses and prospective jurors.

Moreover, in this case, unlike *Lara*, the record strongly suggests that appellant was attempting the delay his trial, for the reasons set forth previously. Furthermore, unlike the defendant in *Lara*, appellant clearly was aware of the reasons he was dissatisfied with his attorney before belatedly asking the trial court to discharge his counsel. On this record, it cannot be said that the trial

court erred in denying the motion. (See *People v. Keshishian*, *supra*, 162 Cal.App.4th at pp. 427-429; *People v. Turner*, *supra*, 7 Cal.App.4th at p. 919; *People v. Lau*, *supra*, 177 Cal.App.3d at pp. 477-479.)

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR A NEW TRIAL

Appellant's second and final contention is that, as he demonstrated at the hearing on his motion for a new trial, he was denied his right to the effective assistance of counsel, therefore his new trial motion should have been granted. (AOB 24-32.) Respondent again disagrees.

A. The Relevant Proceedings Below

After appellant was found guilty, he retained new counsel, who filed a new trial motion on appellant's behalf. In the motion, appellant alleged that he received ineffective assistance of counsel at trial because counsel failed to contact appellant's sister, Monique Lewis, and call her as a defense witness to testify that she gave the shotgun to Forever Merritt for safekeeping on February 4, 2007, approximately two weeks after the incident involving Collins and Daywalt and just a few days before the search warrant was served. The motion was supported by declarations executed by Lewis and Merritt. (SCT 2-13.)[8/]

After hearing argument from both counsel, the trial court denied the motion. The court stated that it believed the evidence adduced by the prosecution was strong, and the testimony provided by Collins and Daywalt was "quite believable." The court found that a different outcome would not have been likely had Lewis testified. The court also noted that calling a relative as a defense witness is problematic in that doing so presents credibility problems.

---

8. As noted previously, Merritt's declaration appears to be missing from the augmented record. However, a copy of her declaration is attached to appellant's motion to augment. (See Exhibit 2 to Appellant's Motion to Augment filed on April 3, 2008.)

(3RT 659-664.)

B. The Applicable Law

A trial court's ruling on a motion for new trial rests so completely within its discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) The defendant has the burden to demonstrate that the trial court's decision was "irrational or arbitrary," or that it was not "'grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

A new trial may be granted where the trial court finds that the defendant received ineffective assistance of counsel. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582-583; *People v. Chavez* (1996) 44 Cal.App.4th 1144, 1148.) To prevail on this ground, a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant in the sense that it "'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" (*People v. Andrade* (2000) 79 Cal.App.4th 651, 659-660, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 686 [104 S.Ct. 2052, 80 L.Ed.2d 674]; see also *People v. Hester* (2000) 22 Cal.4th 290, 296.)

As reviewing courts review the conduct of counsel in hindsight, they should be reluctant to second-guess tactical decisions made by trial counsel. (*People v. Holt* (1997) 15 Cal.4th 619, 703; *In re Fields* (1990) 51 Cal.3d 1063, 1069-1070.) Appellate courts should be equally, if not more, reluctant to second-guess the trial court's discretionary ruling that defense counsel's tactical decisions made before it resulted in an unfair trial, keeping in mind that the trial court is in the best position to make an initial determination, and intelligently

evaluate whether counsel's acts or omissions were those of a reasonably competent attorney. (*People v. Callahan* (2004) 124 Cal.App.4th 198, 211-212 [noting that the cases recognizing the trial court's unique ability to evaluate an attorney's performance are "legion," and citing numerous decisions in support of this proposition]; *People v. Andrade*, *supra*, 79 Cal.App.4th at p. 660; *People v. Wallin* (1981) 124 Cal.App.3d 479, 483 [observing that the trial judge is the one best situated to determine the competency of defense counsel, and moreover that where defendant is represented by different counsel at the motion for a new trial, the trial judge's decision is especially entitled to great weight and the appellate court defers to the judge's fact finding power].)

C. A New Trial Was Not Warranted In This Case On The Basis Of Ineffective Assistance Of Trial Counsel Because Of The Strength Of The Evidence As A Whole And Given That Trial Counsel Likely Decided Not To Call Lewis On The Basis That She Would Have Been Subject To Impeachment For Bias

Appellant has failed to show that the trial court abused its discretion in denying his motion for a new trial. As is the case with most criminal trials, appellant's trial was essentially a credibility contest. The trial judge, who of course had been present when the prosecution witnesses testified and had ample opportunity to evaluate their credibility, found them believable such that a different outcome would have been unlikely even had Lewis testified. Indeed, the record does not show that either Collins or Daywalt had any reason to lie about what happened that day, and neither was impeached in any important way during cross-examination. (See 2RT 335-346 [Collins], 394-397 [Daywalt].)

Moreover, counsel likely refrained from calling Lewis because, as his sister, she would have been impeached for familial bias, a point the trial judge aptly alluded to when he denied the new trial motion. Counsel was entitled, as a matter of trial tactics, to choose to call only Merritt and forego calling Lewis.

(See generally *People v. Medina* (1995) 11 Cal.4th 694, 773 [trial counsel called one of defendant's sisters as a defense witness but stated he did not call additional family members because doing so might have resulted in damaging testimony on cross-examination]; *People v. Knight* (1987) 194 Cal.App.3d 337, 345 [the choice of which, and how many, potential witnesses to interview or call to trial is precisely the type of choice which should not be subject to review by an appellate court]; *People v. Jones* (1981) 123 Cal.App.3d 83, 92 [the selection of potential witnesses involves tactical decisions within the control of trial counsel, and should not be the basis for a claim of inadequate representation]; *People v. Haylock* (1980) 113 Cal.App.3d 146, 151 [the selection of witnesses to call is a matter of trial tactics ordinarily left to the discretion of trial counsel].)

While appellant now opines that the assertion that the shotgun recovered by the police was not the one used on the day of the incident involving Collins and Daywalt "was at the heart" of his defense (AOB 28), it should also be noted that the shotgun was not the only firearm appellant used that day. He also pointed a handgun at Collins after the initial confrontation in which he brandished the shotgun. Thus, appellant could have been convicted of several of the charges even had the jury found that he did not point the shotgun at Collins and Daywalt.

Accordingly, appellant has failed to show that the trial court abused its discretion when it denied his motion for a new trial.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: November 14, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

LINDA C. JOHNSON
Supervising Deputy Attorney General

KAREN BISSONNETTE
Deputy Attorney General

Attorneys for Respondent

KB:lds
LA2008500199
60367236.wpd

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 6118 words.

Dated: November 14, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

KAREN BISSONNETTE
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Maurice Lewis**
Case No.: **B204093**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age and older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On NOV 1 4 2008, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Marilee Marshall (2 copies)
Jennifer Hensen
Attorney at Law
Marilee Marshall & Associates
523 West 6th Street, Suite 1109
Los Angeles, CA 90014

John A. Clarke
Clerk of the Court
Los Angeles County Superior Court
111 N. Hill Street
Los Angeles, CA 90012
To be delivered to:
Hon. Norman J. Shapiro, Judge

Sarah Fuhrman
Deputy District Attorney
Los Angeles County District
Attorney's Office
Clara Shortridge Foltz Bldg.
210 West Temple Street
Los Angeles, CA 90012-3210

The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on NOV 1 4 2008, at Los Angeles, California.

Linda Sarenas
Declarant

Signature

LA2008500199
60367362.wpd